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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/853,391	05/11/2001	Timothy William Dake	8557	6421

27752 7590 07/14/2003

THE PROCTER & GAMBLE COMPANY
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EXAMINER
PRATT, HELEN F

ART UNIT	PAPER NUMBER
1761	11

DATE MAILED: 07/14/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/853,391	DAKE ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the c ver sheet with the c rrespondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 May 2003* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-85,93-98 and 102* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-85, 93-98, 102* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 102 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 102 is indefinite in the use of the phrase "consisting essentially of". It is not known what is meant by this phrase because it is not known what ingredients are intended to be excluded by this phrase.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 102 us rejected under 35 U.S.C. 102(b) as being anticipated by Kishimoto et al. (5,473,097).

Kishimoto et al. disclose a dry composition containing only aspartame in particle sizes greater than 106 microns and less than 96% of a bulking agent in that "less than 96%" reads on zero amounts and the composition is considered to be a food as it is ingestible (abstract and col. 3, lines 14-25).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 2, 14-29, 45-85 and 102 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ishida et al. (6,399,132) or Chuang et al. in view of Sweet'n Low (Tradename) and Kishimoto et al. (5,473,097).

The independent claims are rejected for the reasons of record cited in the last office action and for these further reasons. Claim 1 for example, has been amended to require that the bulking agent is from 50 to 96% of the composition. This is within the range disclosed by SWEET'N LOW (TRADENAME). Also, Kishimoto et al. disclose that it is known to make aspartame particles in a size range of 100 to 500 microns by granulation, and particles of aspartame within the preferable range of 150 to 300 microns (col. 2, lines 55-58). Therefore, it would have been obvious to use the claimed amount and particle size in the process of Ishida et al. or Chuang et al. because these references disclose the higher range of more than 106 microns and Kishimoto et al. discloses usefulness of the lower range of 150.

The further claims except claim 102 and claims 30-44 and 93-98 have been rejected as in the previous office action.

Claim 102 now requires particular amounts of ingredients, in particularly aspartame, which has 50% by weight of the aspartame, has a particular size of greater than 106 microns, and 96% bulking agent and the food is used as food or beverage. The amount of bulking agent in SWEET'N LOW (TRADENAME) as above is less than 95%. The above reference disclose compositions containing the claimed particle size of less than 500 microns which reads on 106 microns in Ishida et al. as above and particles of 150 microns in Chuang et al. as above. It is not known what applicants have excluded by the use of the phrase "consisting essentially of aspartame". In any event a product made by Safeway which is aspartame SWEETENER contains only aspartame and maltodextrin (packet of aspartame SWEETENER).). Also, Kishimoto et al. disclose that it is known to make aspartame particles by granulation to be from 100 to 500 microns and within the preferable range of 150 to 300 microns (col. 2, lines 55-58). Therefore, it would have been obvious to make a product containing only aspartame and other ingredients which do not affect the composition and to use the claimed particle size.

Claims 30-44 and 93-98 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ishida et al. or Chuang et al. in view of Sweet'n low and Kishimoto et al. (5,473,097) and Valentine et al., Menzi as applied to claims 1-85, and 102 above, and further in view of Kampanga et al. (page 7 of last office action).

The claims are rejected for the reasons of record cited on page 6, first paragraph and page 7, first paragraph of the last office action.

ARGUMENTS

Applicant's arguments filed 5-9-03 have been fully considered but they are not persuasive. Applicants argue that Ishida prefers the use of a particle size smaller than that claimed. This is not seen as the reference actually claims particle sizes of less than 500 microns (col. 8, lines 43-45).

Applicants argue that the reference to Ishida does not disclose their claimed amount of bulking agent. However, no unobvious or unexpected results are seen to result from the use of a particular amount of a bulking agent. It would have been within the skill of the ordinary worker to use whatever amount was required to make the required amount of sweetness in the product. In addition, SWEET'n Low discloses the claimed amount.

As to claim 102, the new reference to Kashimoto et al. disclose the composition.

Applicants argue that there is no motivation to combine Chaung with SWEET'n LOW. However, the claims do not say what the bulking agent is, and even the tea solids with 50% maltodextrin could be considered a bulking agent because it serves as a diluent and adds bulk to the composition. SWEET'n LOW also discloses that it is known to dilute aspartame with other ingredients such as dextrose.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication should be directed to Helen F. Pratt at telephone number 703-308-1978.

Hp 7-7-03

H. Pratt

HELEN PRATT
PRIMARY EXAMINER